In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 378

PAUL C. FISHER, DOING BUSINESS AS FISHER PEN COMPANY, PETITIONER

v.

MARTIN P. DURKIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 53–55) are not officially reported. The opinion of the Court of Appeals (R. 68–71) is reported at 204 F. 2d 930.

JURISDICTION

The judgment of the court below was entered on June 17, 1953 (R. 72). The petition for a rehearing was denied on July 13, 1953 (R. 85). The petition for a writ of certiorari was filed on September 26, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the Fourth Amendment to the Constitution requires a specific charge or complaint of violation of law as a condition to enforcement of a subpoena for the production of records relevant to an investigation under the Fair Labor Standards Act.

STATUTES INVOLVED

Sections 9 and 11 (a) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201 *et seq.*,[1] and Section 9 of the Federal Trade Commision Act, c. 311, 38 Stat. 717, 15 U. S. C. 49, are set forth in the Appendix, *infra*, pp. 10–11.

STATEMENT

Petitioner is the sole proprietor of an establishment located at 757 West Waveland Avenue, Chicago, Illinois, where he does business under the name of the Fisher Pen Company (Fdg. 1, R. 54). His business consists of the production, sale, and distribution of ball point pens and precision parts for the electronics industry (Fdg. 1, R. 54).

The subpoena *duces tecum* here involved seeks the production of books and records (R. 17), which petitioner refused to make available to the Wage and Hour Division for examination in connection with an investigation under the Fair Labor Standards Act of 1938, as amended (R. 16). Beginning

[1] The cited sections of the Fair Labor Standards Act of 1938 are not affected in any way by the Fair Labor Standards Amendments of 1949 (c. 736, 63 Stat. 910, 29 U. S. C. Supp. V, 201).

February 1, 1952, the Division made several unsuccessful attempts to secure petitioner's consent to inspect these books and records on a voluntary basis at his place of business (R. 16–17). An administrative subpoena, which was served on petitioner on April 2, 1952 (R. 10), called for petitioner's wage and hour records for the period from March 1, 1950, to March 1, 1952, and records and other data showing shipments made and received by petitioner during the same period (S. R. 9).[1] That subpoena directed that the records be produced at the Wage and Hour Division's Chicago office on April 14, 1952 (R. 11), in the city in which the records were kept.

Petitioner appeared at the time and place directed, but failed and refused to produce the records and documents specified in the subpoena (R. 11). Therefore, on May 21, 1952, application was made to the district court for an order enforcing the subpoena (R. 12). After due notice and hearing (R. 12, 15–26), at which petitioner was present (R. 21, 54), the district court, on June 27, 1952, entered an order directing petitioner to produce and make available to the government officers the records specified in the subpoena at petitioner's own place of business on July 28, 1952 (R. 27), a month later. Petitioner took no appeal from this order, although the district court allowed a period of 30 days before ac-

[1] S. R. refers to the "Supplemental Transcript of Record."

tion was required, explaining to petitioner personally that this was to give him ample time to appeal if he wanted to (R. 25–26). On July 22, 1952, by letter to the district court, petitioner expressed his determination to "stand my ground and let the Court endeavor to force compliance with its demand—if it can," expressing his determination *not* "to appeal this order," scorning that procedure as "special justice which is reserved for the wealthy alone." After referring to his "courage," petitioner concluded with the prediction "that I will not fail in this battle with the Court" (R. 33–35).

As he had done previously, petitioner personally appeared at the time and place specified by the order of the court (R. 62, amended fdg. 6), but again refused to produce the records. Thereupon, the Secretary of Labor applied to the district court for a rule to show cause why petitioner should not be adjudged in civil contempt (R. 28–30).

At the hearing petitioner explained, "I have not complied with this Court's order of June 27th because of the reasons as outlined in my letter of July 22nd to this Court" (R. 40). As the district judge noted, "He has failed to avail himself of that opportunity [to appeal] and he is back here again with practically the same defense he made in the original fashion" (R. 48). On September 18, 1952, after the hearing, the trial court entered findings of fact and conclusions of

law (R. 53–55), which found petitioner guilty of civil contempt as charged (R. 55, Concl. 3). On the same date, an order was entered adjudging him to be in civil contempt, and directing that he be committed to the custody of the Attorney General for imprisonment, "until he should purge himself of said contempt by producing the books, records, and documents specified * * *" (R. 55–56). Commitment was stayed on petitioner's own individual recognizance in the sum of $200 pending appeal (R. 56). On October 17, 1952, petitioner appealed from the order adjudging him in contempt (R. 57), and the Court of Appeals for the Seventh Circuit affirmed. No appeal from the order requiring him to produce the records was ever filed.

ARGUMENT

1. No questions of substance are presented which have not already been settled by *Oklahoma Press Co.* v. *Walling*, 327 U. S. 186, approving judicial enforcement of subpoenas substantially identical to the one here involved (compare S. R. 9 with 327 U. S. at 210 n. 46). It was there held that records similar to those sought here are relevant to the investigations authorized by the Fair Labor Standards Act, and that a subpoena for such records presents "no question of actual search and seizure [under the Fourth Amendment], but raise[s] only the question whether orders of court for the production of specified records have been validly made." *Id.* at 195. The *Okla-*

homa Press decision also specifically disposed of the contention (cf. Pet. 13–17) that the order enforcing the subpoena constitutes a "warrant" without a showing of "probable cause." "It is not necessary, as in the case of a warrant, that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one * * *. The requirement of 'probable cause, supported by oath or affirmation,' literally applicable in the case of a warrant, is satisfied in that of an order for production by the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry." *Id.* at 208–209.

Petitioner's attempt to distinguish the *Oklahoma Press* decision on the ground that it involved corporate records, while the instant case involves the records of an individual businessman, is without substance. The *Oklahoma Press* decision did not rest on the ground that a corporation lacks the right to invoke the Fourth Amendment. On the contrary, the requirements of the Fourth Amendment were examined as if applicable, the Court concluding that "the Fourth, if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant. The gist of the protection

is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable." *Id.* at 208. Moreover, this Court's decisions in analogous situations involving the immunity provisions of the Fifth Amendment show conclusively that there is no distinction between corporate and non-corporate business records where such records are required to be kept by law for purposes of enforcement of a Federal statute. Thus, in *Shapiro* v. *United States,* 335 U. S. 1, this Court held that the rule with respect to production of corporate records (announced in *Wilson* v. *United States,* 221 U. S. 361, and reaffirmed more recently in *Davis* v. *United States,* 328 U. S. 582) was equally applicable to the records of an individual businessman where the records involved are "records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established" (335 U. S. at 33). In so holding, the Court cited *United States* v. *Darby,* 312 U. S. 100 (a case under the Fair Labor Standards Act), and explicitly referred to the part of the *Darby* opinion upholding the record keeping requirements of the Fair Labor Standards Act (335 U. S. at 33 n. 42).

The records which were ordered produced in the instant case plainly fall within this category of "required records" by reason of Section 11 (c) of the Act and Title 29, C. F. R., Part 516,

15 F. R. 3096–3101. See also *United States* v. *Darby,* 312 U. S. 100, 125. The lower federal courts have, accordingly, correctly assumed that the *Oklahoma Press* decision is applicable to individual businessmen as well as corporations. See *Porter* v. *Mueller,* 156 F. 2d 278, 280 (C. A. 3); *Hagen* v. *Porter,* 156 F. 2d 362, 366 (C. A. 9), certiorari denied, 329 U. S. 729; *Raley* v. *Porter,* 156 F. 2d 561 (C. A. D. C.), affirmed on another ground, 331 U. S. 111; *Dossett* v. *Porter,* 161 F. 2d 839, 842 (C. A. 6), certiorari denied, 332 U. S. 771, involving subpoenas under the Emergency Price Control Act in which Fourth Amendment defenses were rejected by the courts. See also *United States* v. *Jones,* 72 F. Supp. 48 (S. D. Miss.), so holding with respect to records of an individual in an action arising under the Fair Labor Standards Act. The decision below is, therefore, clearly correct and presents no conflict of decisions.

2. Even if there were any merit in petitioner's objection to the order enforcing the subpoena, the decisions of this Court would preclude petitioner from questioning the propriety and scope of the original order of enforcement in a subsequent contempt action. *Maggio* v. *Zeitz,* 333 U. S. 56; *McComb* v. *Jacksonville Paper Co.,* 336 U. S. 187; *United States* v. *Mine Workers,* 330 U. S. 258. See also *Woods* v. *Fliss,* 168 F. 2d 612 (C. A. 7). Having failed to appeal from the original enforcement order, petitioner is now

barred by "the long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy." *Maggio* v. *Zeitz*, 333 U. S. 56 at 69.

CONCLUSION

The decision of the court below is clearly correct and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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OCTOBER 1953.

APPENDIX

Fair Labor Standards Act, c. 676, 52 Stat. 1060 (29 U. S. C. 201 et seq.):

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Secretary of Labor, and the industry committees.

* * * * *

SEC. 11. (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12,

the Administrator shall bring all actions under section 17 to restrain violations of this Act.

Federal Trade Commission Act, c. 311, 38 Stat. 717 (15 U. S. C. 49):

SEC. 9.

* * * * *

* * * in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

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